

1 estoppel, the doctrine of res judicata prevents “a party who has had one fair adversary hearing on an
2 issue from again drawing it into controversy and subjecting the other party to further expense in its
3 reexamination.” (Alpha Mechancial Heating & Air Conditioning, Inc. v. Travelers Casualty &
4 Surety Co. of America (2005) 133 Cal.App.4th 1319, 1327.) The doctrine promotes judicial
5 economy because it “precludes piecemeal litigation by splitting a single cause of action or
6 relitigation of the same cause of action on a different legal theory or for different relief.” (Id. at
7 1326, *quoting Mycogen* at 897.)

8 In determining whether an action is barred by claim preclusion or res judicata, the courts
9 examine whether the two proceedings involve the same cause of action. (Id. at 1327.) California
10 courts follow the “primary rights” theory to determine whether the two separate actions involve a
11 single cause of action. (Id.) Under this theory, a cause of action consists of a “primary right” of the
12 plaintiff to be free from the particular injury suffered, a “corresponding primary duty” of the
13 defendant, and “a wrongful act by the defendant constituting the breach of duty.” (Id.) There is a
14 separate cause of action for each “primary right.” Each type of interest invaded is a separate primary
15 right. (Craig v. County of Los Angeles (1990) 221 Cal.App.3d 1294, 1301, *citing Takahashi v.*
16 Board of Education (1988) 202 Cal.App.3d 1464, 1474.) Examples of primary rights include the
17 right to be free from personal injury, the right to possession of real property, and the right to
18 performance of a contractual obligation. (Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, 625.)

19 In Crowley v. Katleman (1994) 8 Cal.4th 666, 681, the California Supreme Court explained
20 that the primary right must be distinguished from the legal theory upon which liability is premised
21 and from the remedy sought. In determining the primary right, “the significant factor is the harm
22 suffered.” *Even where there are multiple legal theories upon which recovery might be predicated,*
23 *one injury gives rise to only one claim of relief.* (Slater v. Blackwood (1975) 15 Cal.3d 791, 795; Bay
24 Cities Paving & Grading, Inc. v. Lawyers Mutual Insurance Company (1993) 5 Cal.4th 854, 860;
25 Emphasis added.) The most salient characteristic of a primary right is that it is *indivisible*, i.e., that
26 violation of a single primary right gives rise to but a single cause of action. A pleading stating two
27 “causes of action” involving the same primary right contravenes the rule against “splitting” a cause of
28 action. (Crowley v. Katleman, *supra*, 8 Cal.4th at 681-682.) “The violation of one primary right

1 constitutes a single cause of action, though it may entitle the injured party to many forms of relief,
2 and the relief is not to be confounded with the cause of action, one not being determinative of the
3 other.” (Id. at 682.) Significantly, “[w]hether a complaint in fact asserts one or more causes of
4 action for pleading purposes depends on whether it alleges invasion of one or more primary rights.”
5 (Hindin v. Rust (2004) 118 Cal.App.4th 1247, 1257.) Further, the manner in which a plaintiff
6 designates his or claim does not determine the number of causes of action. “If a plaintiff states
7 several purported causes of action which allege an invasion of the same primary right he has actually
8 stated only one cause of action.” (Id., quoting Skrbina v. Fleming Companies (1996) 45
9 Cal.App.4th 1353, 1364.)

10 In Alpha Mechancial Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of
11 America, *supra*, 133 Cal.App.4th at 1332, the appellate court determined that RAS sought to
12 relitigate the same claims. RAS dismissed its cross-complaint against Alpha after reaching a
13 settlement. The court noted that in its cross-complaint, RAS sought relief under theories of breach
14 of contract and negligence for Alpha’s defective performance, which allegedly caused the property
15 damage and damage to the work of other trades. In its answer to the complaint, RAS asserted
16 affirmative defenses that sought to hold Alpha liable for the wrongful and negligent contract
17 performance. The court determined that RAS’ primarily right was its right to competent
18 performance of the contract by Alpha; Alpha’s primary duty was it competent performance under the
19 contract; and Alpha’s wrong was its negligent and wrongful performance of the contract. Although
20 Travelers attempted to distinguish the primary rights as sounding in tort and contract, the court ruled
21 that “if two actions involve the same injury to the plaintiff and the same wrong by the defendant
22 then the same primary right is at stake even if in the second suit the plaintiff pleads different theories
23 of recovery, seeks different forms of relief and/or adds new facts supporting recovery.” (Id.,
24 quoting Tensor Group v. City of Glendale (1993) 14 Cal.App.4th 154, 160.) Notably, the court
25 observed that if RAS was permitted to renew these claims, “there would be no meaning to the phrase
26 ‘with prejudice.’” (Id. at 1334.)

27 ///

28 ///

1 Similarly, in the present action, Plaintiff attempts to relitigate the same causes of action that
2 were asserted in the prior complaint. In the First Amended Complaint, Plaintiff asserts the following
3 causes of action against GMACM for breach of fiduciary duty, breach of contract, cancellation of
4 written instrument, quiet title, and violation of Business and Professions Code § 17200.⁹ In the
5 Second Amended Complaint, Plaintiff asserts the same exact causes of action for breach of fiduciary
6 duty, breach of contract, cancellation of written instrument, quiet title, and violation of Business and
7 Professions Code § 17200 against GMACM.¹⁰ In both complaints, the allegations supporting these
8 causes of actions are almost identical.

9 In the breach of fiduciary cause of action in the First Amended Complaint, Plaintiff alleged
10 that GMACM owed a duty to Plaintiff as his lender and servicer.¹¹ In the Second Amended
11 Complaint, Plaintiff merely adds that GMACM owed a duty "to act in accordance with statutory
12 procedures" and "to follow legal process for Notice of Trustee's Sale."¹²

13 In the breach of contract cause of action in the First Amended Complaint, Plaintiff alleged
14 Fremont breached the contract by failing to deliver over \$40,476.92 in loan proceeds to him and that
15 it breached the contract by trying to collect payments from Plaintiff on the \$40,476.92, which was
16 never delivered to Plaintiff. Plaintiff alleged that GMACM, as Fremont's successor in interest, is
17 liable for all of Fremont's past misdeeds. Plaintiff alleged that GMACM also breached the contract
18 by failing to properly account for funds due to Plaintiff, attempting to collect on debts secured by
19 fraud, failing to properly post payments made by Plaintiff to Fremont and GMACM, and by
20 wrongfully foreclosing on the trust deed.¹³ In the Second Amended Complaint, Plaintiff again
21 alleges that GMACM is liable for Fremont's failure to deliver the loan proceeds to him and that
22

23
24 ⁹ See FAC, ¶¶ 113, 120-126, 101-103, 117-118, and 137-142.

25 ¹⁰ See SAC, ¶¶ 94, 119-127, 144-148, 154-156, and 158-164.

26 ¹¹ See FAC, ¶ 113.

27 ¹² See SAC, ¶ 94.

28 ¹³ See FAC, ¶¶ 120-126.

1 GMACM allegedly failed to account for the missing loan proceedings, Plaintiff's payments and
2 "wrongfully" foreclosed on the trust deed.¹⁴

3 In the cancellation of written instrument cause of action in the First Amended Complaint,
4 Plaintiff sought to cancel the trust deed between Fremont and Plaintiff. Plaintiff alleged that the
5 trust deed was procured through Defendants' fraud, misrepresentation, and fraudulent compilation of
6 documents.¹⁵ Plaintiff makes the same exact allegations in the Second Amended Complaint.¹⁶

7 In the quiet title cause of action in the First Amended Complaint, Plaintiff sought to quiet
8 title against all adverse claims and alleges that Defendants have no right, title, estate, lien, or interest
9 in the subject property.¹⁷ These same exact allegations are made in the Second Amended
10 Complaint.¹⁸

11 In the violation of Business and Professions Code § 17200 cause of action in the First
12 Amended Complaint, Plaintiff alleges GMACM's conduct constituted unfair business practices
13 because it allegedly made loans based on falsified information; used bait and switch tactics; made
14 loans without verifying borrower's information; made loans without providing borrower with
15 sufficient, accurate, or understandable information regarding the terms of the loan or the financial
16 risk assumed by the borrower; made loans without regard to the borrower's ability to pay. Plaintiff
17 alleges that GMACM engaged in predatory lending practices; failed to provide notices and
18 disclosures required by TILA; and falsified loan documents.¹⁹ Notably, Plaintiff makes the same
19 exact allegations in the Second Amended Complaint.²⁰

20

21

22 ¹⁴ See SAC, ¶¶ 122-127.

23 ¹⁵ See FAC, ¶¶ 101-102.

24 ¹⁶ See SAC, ¶ 145-146.

25 ¹⁷ See FAC, ¶ 118.

26 ¹⁸ See SAC, ¶ 156.

27 ¹⁹ See FAC, ¶¶ 137-138.

28 ²⁰ See SAC, ¶¶ 158-159.

1 In the Second Amended Complaint, Plaintiff also adds four additional causes of action for
2 reformation of contract, wrongful foreclosure, defamation and tortious interference with credit, and
3 accounting. Although disguised as different causes of action, these causes of action involve the
4 same causes of action that were adjudicated in the prior complaint because they involve the same
5 primary right, i.e., the right to performance of the contract.

6 **B. Plaintiff Is Barred from Asserting Claims that Could Have Been Raised**

7 **Previously**

8 In Torrey Pines Bank v. Superior Court (2003) 216 Cal.App.4th 813, 822, the appellate court
9 recognized that “a final judgment on the merits in a prior action is conclusive between the same
10 parties in a subsequent action involving the same matter.” (*Id.*, quoting Hamilton v. Carpenter
11 (1940) 15 Cal.2d 130, 133.) Importantly, the court observed that “Res judicata bars ‘not only the
12 reopening of the original controversy, but also subsequent litigation of all issues which were or could
13 have been raised in the original suit.” (*Id.*, quoting Gates v. Superior Court (1986) 178 Cal.App.3d
14 301, 311.) The court ruled that “a litigant may not split his cause of action, advancing a portion at a
15 time to the harassment of his adversary.” (*Id.* at 822.) In Craig v. County of Los Angeles, *supra*,
16 221 Cal.App.3d at 1299, the appellate court also determined that “This bar includes ‘matters which
17 were relevant and within the scope of the first action, which thus *could* have been raised in the first
18 suit.” (*Id.*, quoting Duffy v. City of Loan Beach (1988) 201 Cal.App.3d 1352, 1358.)

19 In Mycogen Corp. v. Monsanto Co., *supra*, 28 Cal.4th at 897, the California Supreme Court
20 observed that under the doctrine of res judicata, “all claims based on the same cause of action must
21 be decided in a single suit; if not brought initially, they may not be raised at a later date.” The court
22 recognized that “It is well established that a judgment in an action for breach of contract bars a
23 subsequent action for additional relief based on the same breach. (*Id.* at 905.) The court noted that
24 “a party may not obtain both specific performance and damages for the same breach of contract,
25 either in single or multiple actions.” (*Id.*) The court determined that “[a] plaintiff is ‘bound to
26 obtain all his relief on account of the breach in one action, and could not recover part in one and part
27 in another.” (*Id.* at 906, quoting Abott v. The 76 Land and Water Co. (1911) 161 Cal. 42, 47.)

28 ///

1 In Burdette v. Carrier Corp. (2008) 158 Cal.App.4th 1668, 1673, the plaintiff brought a
2 defamation action against his former employer for slanderous statements made by employees
3 regarding the plaintiff's resignation. Prior to this action, the employer brought a federal action
4 against the plaintiff to recover money it claimed that he owed. The plaintiff brought a cross-
5 complaint against the employer for slander. The federal court granted the employer's motion for
6 summary judgment and dismissed the cross-complaint. (*Id.*) On appeal, the court examined the
7 preclusive effect of the federal summary judgment in state court. (*Id.* at 1674.) The court determined
8 that "Res judicata bars the relitigation not only of claims that were conclusively determined in the
9 first action, but also matters that was within the scope of the action, related to the subject matter and
10 relevant to the issues so that it could have been raised." (*Id.* at 1675.) The court found that "[a]
11 party cannot by negligence or design withhold issues and litigate them in consecutive actions"
12 because res judicata bars the relitigation of matters that were raised or could have been raised in the
13 prior action. (*Id.*) As such, the court ruled that claim preclusion barred the plaintiff's complaint
14 because the statements by the other employees were raised or could have been raised in the federal
15 action. (*Id.*)

16 In the present action, Plaintiff is also barred from bringing the causes of action for
17 reformation of contract, wrongful foreclosure, defamation and tortious interference with credit, and
18 accounting in the Second Amended Complaint because he could have previously asserted them in
19 the First Amended Complaint. Indeed, these same issues were litigated in the prior complaint.

20 **IV. THE COMPLAINT IS BARRED BY COLLATERAL ESTOPPEL**

21 The second aspect of res judicata is issue preclusion or collateral estoppel. "[A] party is
22 collaterally estopped from relitigating an issue if: '(1) the issue decided in a prior action is identical
23 with that presented in the action in question; and (2) there was a final judgment on the merits; and
24 (3) the party against whom the plea is asserted was a party or in privity with a party to the prior
25 adjudication.'" (*Id.* at 1688.) Significantly, "[t]he doctrine of collateral estoppel applies to issues
26 litigated even though some factual matters or legal arguments which could have been raised were
27 not.'" (*Id.*, quoting Lucas v. County of Los Angeles (1996) 47 Cal.App.4th 277, 286.) In

28 ///

1 determining whether both actions involve the same issue, California courts consider the following
2 factors:

3 "Is there a substantial overlap between the evidence or argument to be
4 advanced in the second proceeding and that advanced in the first?
5 Does the new evidence or argument involve application of the same
6 rule of law as that involved in the prior proceeding? Could pretrial
7 preparation and discovery relating to the matter presented in the first
8 action reasonably be expected to have embraced the matter sought to
9 be presented in the second? How closely related are the claims
10 involved in the two proceedings?" (*Id.* at 1689, *quoting* Rest.2d
11 Judgments, § 27, com. c, pg. 252.)

12 In the present action, Plaintiff is barred from asserting the causes of action for breach of
13 fiduciary duty, breach of contract, cancellation of written instrument, quiet title, and violation of
14 Business and Professions Code § 17200 because these causes of action were dismissed by this Court
15 via demurrer and summary judgment.²¹ Further, Plaintiff is barred from asserting causes of action
16 for reformation of contract, wrongful foreclosure, defamation and tortious interference with credit,
17 and accounting because these issues were litigated in the prior complaint involving the same parties
18 and there was a final judgment on the merits.

19 In the reformation of contract cause of action, Plaintiff alleges that the loan should be
20 reformed because it contains a usurious interest rate and because International Mortgage, Inc. was
21 not licensed to arrange loans.²² In the First Amended Complaint, Plaintiff alleged that he was
22 promised a new loan with a fixed annual percentage rate of 7.5% with a one-half point broker fee, a
23 one-year prepayment penalty and \$105,000.00 cash out.²³ After the Court granted GMACM's
24 motion for summary judgment, Plaintiff filed a motion for reconsideration of the Court's order. In
25 the motion, Plaintiff also argued that the loan should be re-written because it was usurious:

26 ///

27 ///

28 ²¹ See Exhibits 2, 3, 4 and 5.

²² See SAC, ¶¶ 115-116.

²³ See FAC, ¶ 22.

1 GMAC, for purposes of this loan and property received a usurious
2 loan. The original transaction as conducted by persons who did not
3 have any license to conduct a loan transaction. GMAC therefore has
purchased "as-is" a usurious loan, the terms of which would be subject
to rewriting or a write down of interest.²⁴

4 In the wrongful foreclosure cause of action, Plaintiff alleges that GMACM wrongfully
5 foreclosed on the subject property. Plaintiff alleges that he was current on his payments based on
6 Defendants' alleged fraud, Fremont's alleged failure to deliver the missing loan proceeds, the
7 alleged improper accounting by Fremont and GMACM, and the usurious interest rate. Plaintiff also
8 alleges that the forbearance agreement between Plaintiff and GMACM was without consideration.²⁵
9 Notably, these issues were adjudicated on summary judgment. In the First Amended Complaint,
10 Plaintiff also alleges that GMACM wrongfully foreclosed on the trust deed.²⁶ In granting summary
11 judgment in GMACM's favor, the Court found that the notice of default was proper because Plaintiff
12 failed to make his mortgage payments when due.²⁷ Indeed, the Court determined that "Since
13 Plaintiff only made two mortgage payments, he has been in default as of April 1, 2007 and has not
14 made sufficient payments to reinstate the loan prior to the foreclosure sale."²⁸

15 In the defamation and tortious interference with credit, Plaintiff alleges that GMACM
16 published false reports to various credit agencies that Plaintiff owed over \$16 million as a result of
17 the foreclosure.²⁹ However, this issue was also previously litigated in the prior complaint. During
18 discovery, Plaintiff alleged that he suffered damages to his credit in part because of the \$16 million
19 balloon payment on his credit report:

20
21
22
23 ²⁴ See Plaintiff's Motion for Reconsideration of Ruling on Summary Judgment by GMAC, which is
attached to GMACM's Request for Judicial Notice as Exhibit 7, pg. 3:28-4:3.

24 ²⁵ See SAC, ¶ 150.

25 ²⁶ See FAC, ¶ 126.

26 ²⁷ See Exhibit 3.

27 ²⁸ See Exhibit 4, pg. 3:16-19; pg. 4:10-15; pg. 5:12-14; pg. 6:6-11; pg. 7:20-22; pg. 8:14-19; pg.
9:28-10:2; pg. 10:22-27.

28 ²⁹ See FAC, ¶ 178.

1 The harm done to the plaintiff's credit report now includes TWO
2 UNLAWFUL DETAINERS, a FORECLOSURE, with a \$16
3 MILLION dollar BALLOON payment due, 120 days mortgage lates,
and TWO other JUDGMENTS, along with collection agencies
actions.³⁰

4 Significantly, in opposing GMACM's motion for summary judgment, Plaintiff raised this very same
5 issue. In his opposition, Plaintiff argued that GMACM added a \$16 million balloon payment to the
6 loan and "has misreported to credit reporting agencies a non-existent balloon payment of \$16
7 million."³¹ As this issue was decided in the prior complaint, Plaintiff is collaterally estopped from
8 raising it again in the Second Amended Complaint. Moreover, the credit report from Experian
9 shows that there was a \$0 balance as of September 2008. As such, Plaintiff cannot show how he has
10 been damaged by this.³²

11 In the accounting causes of action, Plaintiff requests a complete accounting of all transactions
12 relating to the loan.³³ This cause of action was litigated in the prior complaint wherein Plaintiff
13 alleges that GMACM failed to investigate the missing \$40,476.92 in loan proceeds, misapplied his
14 payments, and failed to properly account for and apply payments that Plaintiff made to Fremont and
15 GMACM.³⁴ Significantly, in granting summary judgment in GMACM's favor, the Court ruled that
16 the notice of default was proper because Plaintiff failed to make mortgage payments due. The
17
18
19

20
21 ³⁰ See Plaintiff's Responses to Fremont's Special Interrogatories, Set One, pg. 14:5-8; also see
22 Plaintiff's Responses to Fremont's Special Interrogatories, Set Two, pg. 5:6-7 ["Now, I see there is a
'BALLOON PAYMENT' due added to my credit report for \$16 MILLION..."]. Plaintiff's
responses to discovery are attached to Defendant's Request for Judicial Notice as Exhibits 8 and 9.

23 ³¹ See Plaintiff's Opposition to GMACM's Motion for Summary Judgment filed on September 28,
2009, pg. 5:7-8; pg. 10:8-9, which is attached to GMACM's Request for Judicial Notice as Exhibit
24 10.

25 ³² See Declaration of Robert Sweeting in Opposition to the Motion for Summary Judgment filed by
26 GMAC, pg. 7:23-25; also see Credit Report from Experian, which is attached to Sweeting Decl. as
27 Exhibit I. Sweeting's Declaration and Exhibit I are attached to GMACM's Request for Judicial
28 Notice as Exhibit 11.

³³ See SAC, ¶ 184.

³⁴ See FAC, ¶¶ 60-62.

1 Court's order also details Plaintiff's payment history and found that Plaintiff only made two
2 mortgage payments to Fremont and GMACM prior to the foreclosure.³⁵

3 In short, these issues were litigated in the prior complaint involving the same parties and
4 GMACM obtained a final judgment on the merits. Hence, Plaintiff is collaterally estopped from
5 relitigating these issues in the Second Amended Complaint.

6 **V. CONCLUSION**

7 In conclusion, GMACM respectfully requests that the Court sustain its demurrer to Plaintiff's
8 Second Amended Complaint *without* leave to amend because the same causes of action and same
9 issues were litigated in the prior complaint, which was adjudicated in GMACM's favor via summary
10 judgment. As such, the doctrine of res judicata and collateral estoppel bar Plaintiff from relitigating
11 the same causes of action and issues in the Second Amended Complaint.

12
13 DATED: February 9, 2010

WOLFE & WYMAN LLP

14
15 By: 

16 STUART B. WOLFE
17 SAMANTHA N. LAMM
18 Attorneys for Defendant
19 GMAC MORTGAGE, LLC
20
21
22
23
24
25
26
27
28

³⁵ See Exhibits 3 and 4, pg. 3:1-4:15, pg. 4:25-6:11, pg. 7:5-